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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-341

THE STATE OF CALIFORNIA, acting by and through
the DEPARTMENT OF WATER RESOURCES,
Petitioner,

VS.

THE OROVILLE-WYANDOTTE IRRIGATION
DISTRICT, an irrigation district,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF FOR INTERVENOR-RESPONDENT
IN OPPOSITION**

RICHARD D. GRAVELLE,
J. CALVIN SIMPSON,
FREDERICK E. JOHN,

5066 State Building,

San Francisco, California 94102,

*Attorneys for the Public Utilities
Commission of the State of California.*

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The California Public Utilities Commission (CPUC) respectfully prays that a writ of certiorari *not* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled action on June 3, 1976.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Eastern District of California appear in Appendices A and B to the Petition.

JURISDICTION

The jurisdictional requisites are set forth in the Petition. The CPUC was granted intervention in the action before the United States District Court for the Eastern District of California. The District Court's decision granted the motion of both respondent Oroville-Wyandotte Irrigation District (OWID) and respondent CPUC for summary judgment against petitioner Department of Water Resources (DWR). The United States Court of Appeals for the Ninth Circuit expressly adopted and affirmed the District Court's opinion.

QUESTIONS PRESENTED

The question before this Honorable Court are set forth in the Petition.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Some of the constitutional provisions and federal and state statutes involved herein are set forth in the

Petition (United States Constitution, Article I, Section 8, clause 3; Section 10 of the Federal Power Act, 49 Stat. 842 (1935), 16 U.S.C. Sections 803(a), 803 (b) and 803(c); Section 317 of the Federal Power Act, 49 Stat. 862 (1935), 16 U.S.C. Section 825(p); California Water Code Sections 11590, 11591 and 11592). However, the following statutes and regulations are also relevant to this proceeding:

Section 21 of the Federal Power Act, 41 Stat. 1074 (1920), 16 U.S.C. Section 814:

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, *or in the State courts*. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: Provided, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000." (Emphasis added.)

Section 27 of the Federal Power Act, 41 Stat. 1077 (1920), 16 U.S.C. Section 821:

"Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

STATEMENT OF THE CASE

Both petitioner DWR and respondent OWID are agencies of the State of California (California Water Code, Section 11102) and both agencies are licensees of the Federal Power Commission (FPC) by virtue of their respective water projects, Major Power Project No. 2100 (DWR's Oroville Project) and Major Power Project No. 2088 (OWID's South Fork Project) located in the Feather River Basin of California.

DWR constructed and presently operates a reservoir on the Feather River in Butte County, California, known as the Oroville Reservoir. The Oroville Reservoir is licensed as part of DWR's Project No. 2100. OWID constructed and presently operates a canal, known as the Miners Ranch Canal, which is located above and parallel to a portion of the Oroville Reservoir in the Feather River's South Fork Canyon. The Miners Ranch Canal is licensed as part of OWID's Project No. 2088. OWID's Miners Ranch Canal was completed approximately four years prior to the completion of DWR's Oroville Reservoir.

On October 14, 1966 OWID filed an application (Application No. 48869) with the CPUC for an order determining OWID's rights with respect to DWR resulting from alleged damage to OWID's Miners Ranch Canal by the impending operation of DWR's Oroville Reservoir. The statutory authority for the assertion of jurisdiction by the CPUC was Sections 11590 through 11592 of the California Water Code.

On November 17, 1966 OWID, pursuant to Article 5 of its FPC license for Project No. 2088, filed with the FPC maps and plans showing certain project works of Project No. 2088 as they were actually constructed and also filed a written statement describing and supporting divergencies and variations between those project works actually constructed and those previously authorized by the FPC. Among the facilities depicted by these maps and plans were the Miners Ranch Canal and its appurtenant facilities. DWR filed a protest against the approval of OWID's "as built" drawings on the ground, among others, that OWID made substantial alterations in parts of its Project No. 2088, including the Miners Ranch Canal and its appurtenant facilities, without the FPC's prior approval.

After hearings regarding OWID's application for approval of its "as built" drawings, the FPC Presiding Examiner in his *initial decision* questioned the CPUC's jurisdiction over the subject dispute between DWR and OWID; found that the operation of DWR's Oroville Reservoir would destroy certain portions of OWID's Miners Ranch Canal, because the

canal was not designed and constructed to withstand the potential effects of DWR's Oroville Reservoir; recommended that approval of OWID's "as built" drawings of the Miners Ranch Canal be denied; and implied that OWID should bear all initial costs of of construction. OWID filed exceptions to the *initial decision* of the FPC's Presiding Examiner. DWR filed a brief in opposition to OWID's exceptions, and oral argument on exceptions was held before the FPC *en banc*.

Thereafter, the FPC (the Commission itself and not merely the Presiding Examiner) issued an order (41 FPC 100) that OWID file revised plans regarding the Miners Ranch Canal, and that it retain a three-member Board of Consultants "to assess and review the adequacy and soundness of OWID's revised plans for the Miners Ranch Canal or for a suitable facility to replace such a canal." DWR was given an opportunity to submit to the Board of Consultants any alternative proposals which it believed necessary to assure the adequacy and soundness of the Miners Ranch Canal or necessary to provide a suitable facility to replace such canal. Upon receipt of OWID's revised plans and DWR's alternative proposals, if any, the Board would submit to these parties its report of findings as to the feasibility and desirability of the plan or plans which it found most appropriate for the revision or replacement of the Miners Ranch Canal. Upon receipt of the Board's report OWID and DWR, either individually or jointly, would file with the FPC their respective plans for the revision

or replacement of the Miners Ranch Canal, together with a copy of the Board's report. The FPC denied DWR's application for rehearing or modification of its order of January 29, 1969 (41 FPC 234).

While the FPC proceedings were in progress, the CPUC issued a series of decisions wherein it asserted its jurisdiction over the subject matter of Application No. 48869; held there was no jurisdictional conflict with either the federal courts or the FPC by virtue of the CPUC's assertion of jurisdiction; concluded that portions of the Miners Ranch Canal would be taken or destroyed, within the meaning of Section 11590 of the California Water Code, by the operation and maintenance of DWR's Oroville Reservoir; and determined that DWR would in effect, have to replace the Miners Ranch Canal. However, the CPUC also stated that *it would retain jurisdiction of the proceedings for all purposes and that the proceedings could be reopened if the parties agreed on an alternative facility or if the FPC failed to approve the new project.*

Both the United States District Court for the Eastern District of California and the United States Court of Appeals for the Ninth Circuit denied the motion of DWR to dismiss the CPUC proceedings. The courts recognized the CPUC's "primary right to determine its own jurisdiction" and that the CPUC was "charged with the duty of determining the liability for damage done by one California agency to the property of another." (*State of California v. Oroville-Wyandotte Irr. Dist.*, 409 F.2d 532, 536 (9th Cir. 1969).)

On February 18, 1970 the FPC issued an order summarizing the findings of its Board of Consultants and requiring that the recommendations of the Board be implemented (43 FPC 200). In this respect the FPC ordered that OWID submit to the FPC, within six months, revised plans and exhibits to implement the Board's recommendations, and that DWR cooperate as much as possible in the situation. Based on the Board's report the FPC ordered certain modifications to the Miners Ranch Canal which differed from the modifications recommended by the CPUC. Thereafter, the CPUC, on motion by OWID, modified its earlier decision to incorporate the proposals for "substitute facilities" approved by the FPC in its order of February 18, 1970. However, based on its previous finding of a taking and destruction of the Miners Ranch Canal by DWR's Oroville Reservoir, the CPUC ordered that *DWR* should be "financially responsible" for the substitute facilities (CPUC Decision No. 82561).

The CPUC denied rehearing of Decision No. 82561, and the California Supreme Court denied DWR's petition for writ of review and for rehearing of the Court's denial.

In the meantime the FPC issued an order on January 17, 1974 approving OWID's final plans and exhibits and ordered OWID to commence construction of the "substitute facilities." However, at no time did the FPC determine who should bear the cost of the construction. DWR did not seek federal review of any of the FPC orders, and the time to do so has expired.

Finally, the United States District Court and the United States Court of Appeals have denied DWR's attempts to overturn the CPUC's decision.

WHY CERTIORARI SHOULD BE DENIED

Petitioner DWR is making claims before this Court which the California Supreme Court, the United States District Court for the Eastern District of California and the United States Court of Appeals for the Ninth Circuit have unanimously rejected. None of these tribunals has seen any merit in DWR's contention that a conflict exists between the decisions of the CPUC and the FPC with respect to the respective projects of DWR and OWID. On the contrary, these courts have stated that:

"The CPUC did not substantially alter nor did it prevent the operation of federal power projects, but rather, was in aid of these projects. As such, the action of the CPUC was entirely compatible with the duality inherent in the Federal Power Act." (*State of California v. The Oroville-Wyandotte Irrigation District*, 411 F.Supp. 361, 368 (E.D. Cal. 1975)).

DWR contends that this language ignores OWID's departure from the terms and conditions of its FPC license and in fact rewards a licensee for violations of the terms of its license. However, DWR fails to note that the FPC never stated that it was OWID's actions which destroyed the Miners Ranch Canal. In-

stead, the FPC stated that the structural integrity of the Miners Ranch Canal was affected by the development and operation of DWR's Project No. 2100.

DWR correctly states that Rule 19(1)(b) of the Supreme Court Rules provides that one of the grounds for certiorari is where a court of appeals "has decided a federal question in a way in conflict with applicable decisions" of this court. The CPUC, submits, however, that DWR is incorrect in alleging that the decision of the United States Court of Appeals for the Ninth District "substantially erodes the comprehensive regulatory scheme" set forth in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946). In *State of California v. Oroville-Wyandotte Irrigation District*, 409 F.2d 532 (9th Cir. 1969), the Court of Appeals stated as follows:

"The Department urges that *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143, applies. In that case, the FPC refused to issue a license until the applicant obtained approval from the state. The Court held that this gave the state a veto power over federal projects and destroyed the effectiveness of the Federal Power Act. In the present case, however, the California Public Utilities Commission does not have a veto power over the Department's Oroville Dam Project. It is merely charged with the duty of determining the liability for damage by one California agency to the property of another." (409 F.2d at 536.)

The CPUC respectfully submits that it carried out this duty, especially in light of the FPC's specific re-

fusal to make a determination as to whether OWID or DWR was liable for the "substitute facilities" for the Miners Ranch Canal. In taking this action the CPUC was complying fully with the mandate of the *First Iowa* decision.

DWR incorrectly contends that Articles 48 and 51 of OWID's license places full financial responsibility upon OWID for the modification of the Miners Ranch Canal. Neither Article 48 nor Article 51 places financial responsibility upon OWID for modifications to the Ponderosa Dam or the Miners Ranch Canal. Both of these projects were controlled and operated by OWID. OWID was the logical party to *perform* the protective measures with respect to both projects. However, it was the workload, and not any financial responsibility, to which OWID acquiesced regarding these Articles.

Petitioner's reliance on *Pacific Power and Light Company v. Federal Power Commission*, 333 F.2d 689 (9th Cir. 1964) is also misplaced. The *Pacific Power* case, cited by DWR as support for its interpretation of Article 51 herein, is clearly distinguishable from the present case. In the *Pacific Power* case only Pacific Power & Light Company was an FPC licensee. The Department of Fish and Game was merely a protestant in Pacific Power's license proceeding. In the present case both DWR and OWID are licensees. In the *Pacific Power* case the FPC found that since the licensee (Pacific Power) created the situation which necessitated the fish hatchery, namely the construction of the Iron Gate Dam, it was reason-

able to require that it pay the cost of construction thereof. In the present case the FPC found that DWR's operation of the Oroville Reservoir affected the structural integrity of OWID's Miners Ranch Canal. Under the theory of the *Pacific Power* case DWR created the situation which necessitated the "substitute facilities" for OWID's Miners Ranch Canal. Therefore, it would have been reasonable for the FPC to require that DWR pay the cost of construction thereof. However, as stated above, the FPC specifically refused to rule on the issue of DWR's or OWID's liability for these substitute facilities.

The language from the *Pacific Power* case quoted by DWR at page 18 of the Petition relates to Pacific Power's contention to the Court in that case that the licensee's settlement agreement with the Department of Fish and Game, which predated the issuance of the license for the subject project, as well as Articles 49 and 50 of the amended license, gave Pacific Power a contract right to have the state *maintain and operate* the hatchery. Having already determined that the licensee had the financial responsibility for the construction of the hatchery, it was reasonable for the Court to conclude, *absent any agreement to the contrary*, that the licensee should be financially responsible for maintaining and operating the hatchery. In the present case Article 51 contains no language dealing with *maintenance or operation* of the substitute facilities, and as stated above, the FPC refused to determine who would be financially responsible for the construction of these facilities.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

RICHARD D. GRAVELLE,

J. CALVIN SIMPSON,

FREDERICK E. JOHN,

5066 State Building,

San Francisco, California 94102.

Attorneys for the Public Utilities

Commission of the State of California.

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